INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, Executive Orders and Rules	2
Statement	4
Summary of argument	12
Argument:	
I. The indictments were returned by a duly constituted grand jury and are valid; they were not subject to dismissal because presentation of the cases to the grand jury had not previously been specifically authorized by the Attorney General	16
II. The District Court did not abuse its discretion when it denied petitioner's motion to set aside the judgments of conviction and to permit him to withdraw his pleas of *nolo contendere*	26
Conclusion	39
Appendix	40

CITATIONS

Cases:

Bergen v. *United States*, 145 F. 2d 181	28, 36
Blair v. *United States*, 250 U.S. 273	17
Charge to Grand Jury, Re, 30 Fed. Cas. No. 18,248	17
Cobbledick v. *United States*, 309 U.S. 323	17
Cone v. *West Virginia Paper Co.*, 330 U.S. 212	35
Friedman v. *United States*, 200 F. 2d 690, certiorari denied, 345 U.S. 926	27
Frisbie v. *United States*, 157 U.S. 160	17
Futterman v. *United States*, 202 F. 2d 185	27
Hale v. *Henkel*, 201 U.S. 43	17
Hart Coal Corp. v. *Sparks*, 9 F. Supp. 825	23
Helvering v. *Mitchell*, 303 U.S. 391	25
Hepner v. *United States*, 213 U.S. 103	25
Hudson v. *United States*, 272 U.S. 451	27
Kercheval v. *United States*, 274 U.S. 220	37
Miller, In re, 17 Fed. Cas. No. 9552	17

Cases—Continued

	Page
Ridgeway v. *United States*, 205 F. 2d 680	34
Stidham v. *United States*, 170 F. 2d 294	34
Stockwell v. *United States*, 13 Wall. 531	25
United States v. *Colonna*, 142 F. 2d 210	28
United States v. *Evan Raymond Dale*, Crim. No. 18118, E.D. Ill. (opinion dated May 1, 1954) (unreported)	18
United States v. *Dotterweich*, 320 U.S. 277	14, 24
United States v. *Fox*, 130 F. 2d 56, certiorari denied, 317 U.S. 666	27
United States v. *Lias*, 173 F. 2d 685	36
United States v. *Morgan*, 222 U.S. 274	14, 23
United States v. *One 1941 Cadillac Sedan*, 145 F. 2d 296	14, 22
United States v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301	17
United States v. *Safeway Stores*, 140 F. 2d 834	25
United States v. *Fred M. Saigh, Jr.*, No. 27136(3), E. D. Mo. (Eastern Division) (order dated Aug. 20, 1952) (unreported)	18
United States v. *Shneer*, 194 F. 2d 598	27, 29, 34
United States v. *Smyth*, 104 F. Supp. 283	17
United States v. *Thompson*, 251 U.S. 408	17
United States ex rel. Marcus v. *Hess*, 127 F. 2d 233, reversed, 317 U.S. 537	24
Von Moltke v. *Gillies*, 332 U.S. 708	36
Williams v. *United States*, 192 F. 2d 39	27

United States Constitution and Statutes:

Constitution of the United States:	
Fifth Amendment	17
Act of March 3, 1933, c. 212, Sec. 16, 47 Stat. 1517-18	18
Internal Revenue Code of 1939:	
Sec. 145 (26 U.S.C. Sec. 145)	2
Sec. 3740 (26 U.S.C. Sec. 3740)	3, 14, 24, 25
Sec. 3741 (26 U.S.C. 1946 ed. 3741)	25
Sec. 3748 (26 U.S.C. Sec. 3748)	22, 25
Internal Revenue Code of 1954, Sec. 7401	25
28 U.S.C. Sec. 507	20, 22

Miscellaneous:

	Page
Black, *Law Dictionary*, 4th ed. 1951, p. 1603	25
Circular Letter No. 2431, dated August 10, 1933,	13, 18, 20, 21, 40
Executive Order No. 6166 (5 U.S.C. Secs. 124-132), Sec. 5	3, 13, 17, 18, 19, 22
Federal Rules of Criminal Procedure, Rule 32,	4, 14, 26, 27, 36, 37, 38
H. Rep. No. 1337, 83d Cong., 2d Sess., p. A430	26
S. Rep. No. 1622, 83d Cong., 2d Sess., p. 609	26

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 64

ODOM FARRELL SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 97-101) is reported at 212 F. 2d 125. The order of the District Court denying petitioner's motions and its findings of fact in support thereof (R. 89-92) are not reported.

JURISDICTION

The judgments of the Court of Appeals were entered April 9, 1954 (R. 102-103). The petition for a writ of certiorari was filed on May 6, 1954

and was granted on June 7, 1954. (R. 103). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the indictments, though properly returned by a duly constituted grand jury, were invalid because presentation of the cases to the grand jury had not previously been specifically authorized by the Attorney General.

2. Whether the District Court erred in refusing to grant petitioner's motion to set aside the judgments of conviction and to permit him to withdraw his pleas of *nolo contendere*.

STATUTES, EXECUTIVE ORDERS AND RULES

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

SEC. 3740. AUTHORIZATION TO COMMENCE SUIT.

No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced.
(26 U. S. C. 3740.)

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 124-132):

Section 5.—*Claims by or against the United States.*

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon pros-

cution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

Federal Rules of Criminal Procedure:

Rule 32. SENTENCE AND JUDGMENT

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On February 28, 1952, a duly constituted grand jury for the District of Kansas returned two indictments against petitioner (R. 1-4). The first count in indictment No. 8751 charged that peti-

tioner wilfully attempted to defeat and evade a large part of his individual income tax for the calendar year 1945 by filing a false and fraudulent income tax return (R. 1-2). Counts two, three and four charged like offenses for the years 1946, 1947 and 1948 (R. 2-3). Count one in No. 8752 charged that petitioner was the president of Central Theater Company, Inc., a corporation, and that he wilfully attempted to defeat and evade a large part of the income taxes due and owing by the corporation for the calendar year 1945 by filing a false and fraudulent tax return, wherein he understated the net income of the corporation for the year 1945 and the amount of income tax due thereon (R. 3-4). Count two charged a like offense involving the year 1946 (R. 4).

On September 8, 1952, petitioner, represented by his counsel, Messrs. Luce and Maloney of Washington, D. C., and Mr. Harley of Kansas, entered a plea of not guilty to the six counts of the two indictments (R. 5, 89-90).

On January 12, 1953, petitioner filed motions to dismiss the indictments on the ground that evidence concerning the violations had not been presented to the grand jury by the United States Attorney pursuant to the direction of the Attorney General (R. 23-24). Petitioner filed, as an exhibit to these motions, a letter dated January 31, 1952, written by a Department of Justice official to Mr. Luce, of counsel for petitioner, advising him that petitioner's case had been referred to the Department of Justice with the recommen-

dation that criminal proceedings be instituted against him for individual income tax evasion for the years 1946-1948, inclusive, and for evasion of corporate income tax for the year 1946, and stating that a conference date, as previously requested by Mr. Luce, would be proposed soon after March 15, 1952 (R. 25-26). The United States Attorney filed an answering affidavit by Charles S. Lyon, then Assistant Attorney General, Tax Division, Department of Justice, dated January 19, 1953, stating that a conference in the Justice Department is granted as a matter of grace, not as a matter of right, that no statute requires that cases be referred to the Justice Department in Washington prior to institution of criminal proceedings, and that in some instances cases are referred by the Bureau of Internal Revenue directly to the United States Attorney without prior review in the Tax Division, Department of Justice (R. 24-25).

Petitioner's motions to dismiss were argued at length on January 21, 1953, and taken under submission by the court with briefs on behalf of both parties being filed. At this hearing petitioner was represented by Mr. Luce of Washington, D. C., and Messrs. Harley and Jochems of Kansas (R. 90), the three counsel who represented petitioner throughout the proceedings in the courts below. The court denied the motions to dismiss (R. 90). The cases were later consolidated and set for trial April 6, 1953 (R. 26, 90).

On April 6, 1953, petitioner and his three counsel being personally present, a jury was empaneled and sworn (R. 90). Thereafter and prior to the entry

of petitioner's pleas of *nolo contendere* a number of meetings between counsel for petitioner and the United States Attorney took place at which the pleas to be entered by petitioner were discussed. The details of these meetings are set forth in affidavits subsequently filed in support of and in opposition to petitioner's motion to set aside the judgment of conviction (R. 56-73). At the hearing on the motion the United States Attorney observed that there was not much difference in the recollections of the various participants as to what occurred (R. 76).

The first meeting at which the pleas to be entered by petitioner were discussed took place the evening of April 6, 1953, at the invitation of the United States Attorney (R. 67). All of the meetings the following day were at the initiative of petitioner's counsel (R. 64-65). When it appeared that petitioner would not plead guilty to any of the counts because of its possible effect on his civil cases (R. 67), someone[1] suggested *nolo contendere* and further discussion centered on whether such a plea would be acceptable to the Department of Justice and the Court (R. 67-69, 63-65). The question whether petitioner had a good case for probation was also discussed and the relevant factors explored (R. 68-69, 63). Petitioner's counsel asked the United States Attorney if he would recommend probation (R. 67-68, 69). The United States Attorney replied that it was not the practice of the court to

[1] The United States Attorney states that *nolo contendere* was suggested by Mr. Luce (R. 67). Mr. Luce states that the plea was first suggested by Mr. Bingham, the United States Attorney's assistant (R. 63).

ask for a recommendation (R. 68, 59). This was duly reported to petitioner (R. 45, 64).

The next day, April 7, 1953, counsel for petitioner called on the United States Attorney three times (R. 64-65). In the afternoon the United States Attorney informed petitioner's counsel that he had obtained oral approval from the Department of Justice of a settlement involving pleas of *nolo contendere* to certain of the counts and dismissal of the remaining counts (R. 64). Messrs. Luce and Jochems for petitioner and the United States Attorney then went before the court in chambers to ascertain whether the court would accept a plea of *nolo contendere*. While in chambers the court inquired as to the civil liabilities of petitioner and was informed that civil liabilities were outstanding. (R. 64). The court remarked that in cases where the defendant pleaded guilty and was placed on probation, such plea was entered without prejudice to defendant's rights to dispose of his civil liabilities (R. 65).

There were further discussions among counsel that night. The United States Attorney reiterated that he would not be in a position to recommend probation (R. 69) and petitioner was informed that his counsel had been "unable to obtain a commitment" from the United States Attorney "that he would make a recommendation of probation or suspended sentence" (R. 60). The United States Attorney recalls making no statement that he would not oppose probation (R. 70), and this is confirmed by his assistant (R. 71). Counsel for petitioner state that the United States Attorney

said he would not oppose probation (R. 63). The court found that "no promise of probation or leniency was made" (R. 92).

Petitioner was fully advised by his counsel of all discussions with the United States Attorney (R. 57, 60, 64, 66), and reached his decision to plead *nolo contendere* after "considerable discussion and consideration" (R. 47).

The next day, April 8, 1953, petitioner appeared with his three counsel and moved to withdraw his plea of not guilty to counts one and two of indictment No. 8751 and count one of indictment No. 8752 and tendered pleas of *nolo contendere* to these counts (R. 26-27). The United States Attorney recommended acceptance of the pleas and stated that he had authority from the Department of Justice in Washington to do so (R. 26). Thereupon, the court accepted the pleas and on motion of the Government, the remaining counts were dismissed (R. 27). The court deferred sentence so that a complete pre-sentence report by the probation office could be prepared, and set the sentencing hearing for May 5, 1953 (R. 27), which was later continued at the request of the petitioner to May 26, 1953 (R. 91).

At the sentencing hearing, on May 26, 1953, petitioner appeared with Messrs. Luce and Jochems (R. 34, 35). The United States Attorney was invited by the court to make a statement about the case (R. 28, 91). The United States Attorney reviewed in detail the charges in the two counts in indictment No. 8751 which were before the court for sentencing (R. 28). After noting that the re-

maining counts had been dismissed, he stated the amount of tax evaded as charged in each such count (R. 28). He then reviewed in detail the charges in count one of indictment No. 8752 which was before the court for sentencing and stated, as to count two, only that it had been dismissed (R. 28-29).

The United States Attorney then stated that he felt he owed "a duty to the court to give the background of the investigation somewhat of Mr. Sullivan and his history taxwise" (R. 29). In the course of this further statement he discussed petitioner's civil tax liabilities as claimed by the Government and reviewed some of the difficulties the Government had had in dealing with petitioner in the course of its investigation of his tax returns. In closing he summarized the Government's claims as to civil liabilities, noting that these amounts were not involved in the criminal case. (R. 29-34.) The United States Attorney made no statement with respect to the sentence to be imposed or probation (see R. 28-34).

The United States Attorney was followed by petitioner's counsel, Mr. Luce of Washington, D. C., who stressed, among other things, that the civil liabilities which had been mentioned were not before the court and that their amount was in dispute and would have to be settled by the Tax Court of the United States (R. 34-35). Mr. Jochems, also of counsel for petitioner, suggested that petitioner's difficulties stemmed from his being too busy on bigger things and that there was no actual fraud. He discussed the civic record of

petitioner and asked that petitioner be placed on probation for whatever sentence the court imposed, mentioning in this connection that his health was not good. (R. 35-39.) Petitioner then himself made a brief statement beseeching clemency (R. 39).

Following these statements, the court imposed sentences totalling three years imprisonment and fines of $13,000 and denied petitioner's application for probation (R. 39-40).

On May 29, 1953, petitioner filed a motion in arrest of judgment based on the same grounds as his earlier motion to dismiss the indictments (R. 42) and a motion to set aside the judgment of conviction and permit the withdrawal of his plea of *nolo contendere* (R. 42-43). On June 12, 1953, an amended motion to permit withdrawal of the plea (R. 43-49) and a petition for probation (R. 50-55) were filed.

On June 23, 1953 hearings were held on petitioner's motions. Petitioner's three counsel each addressed the court on various of the matters involved. (R. 73-74.) Affidavits of petitioner's counsel reviewing discussions between counsel for petitioner and counsel for the Government immediately prior to entry of petitioner's pleas of *nolo contendere* (R. 56-66) were offered and received in evidence (R. 74). The court heard testimony of twelve character witnesses in support of petitioner's petition for probation (R. 74-76). Thereafter the United States Attorney and his assistant argued for the Government and filed (R. 76) affidavits containing their recollection of the events of

April 5-7, 1953 (R. 66-73). At the conclusion of the hearings the court denied petitioner's motions (R. 88). With his order the court filed detailed findings of fact (R. 89-92) which included the following (R. 91-92):

> 9. At the June 23 hearing, the court specifically inquired of defendant's counsel as to whether any remark or statement made by the court to defendant's counsel had influenced them in advising the defendant to enter the pleas above mentioned. The court was assured by defendant's counsel and now finds that no statement of the court made to defendant's counsel or in the presence of defendant influenced the defendant's entrance of his pleas of nolo contendere.
>
> 10. The court further finds that no promise of probation or lenience was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government.

The Court of Appeals for the Tenth Circuit affirmed the conviction, finding nothing in the record that vitiated the two indictments or indicated that the trial court had abused its discretion in denying petitioner's motion for leave to withdraw his plea of *nolo contendere* (R. 97-101).

SUMMARY OF ARGUMENT

I

Petitioner's contention that the indictments were subject to dismissal because the Attorney General had not directed the United States Attorney to present the cases to the grand jury is without merit.

The indictments were returned by a duly constituted grand jury. No attack is made on its organization or proceedings.

Executive Order No. 6166 was issued pursuant to authority granted by Congress to achieve the purposes of economy and efficiency in Government. It was not intended to and does not limit the inherent power of grand juries to inquire into all criminal matters within their jurisdiction. Its sole purpose was to transfer to the Department of Justice responsibility for the conduct of all civil and criminal proceedings to which the United States is a party.

Circular Letter 2431, in which the Attorney General directed all United States Attorneys to present evidence to grand juries only when authorized to do so by the Attorney General, was a departmental instruction concerned solely with the internal functioning of the Department of Justice. It is not a public document and patently was not intended to confer rights on defendants. Moreover it was not shown that the circular letter, which authorized United States Attorneys to present evidence without prior authorization from the Attorney General whenever "an emergency calls for

immediate action", was not complied with to the satisfaction of the Attorney General. The indictments were returned on February 28, 1952. The statute of limitations was due to run on one of the major counts in each indictment on or about March 14, 1952. In the absence of evidence to the contrary, the United States Attorney, an agent of the Department of Justice, must be presumed to have acted within his authority (*United States* v. *One 1941 Cadillac Sedan*, 145 F. 2d 296, 299 (C.A. 7) and in any event his actions were tacitly ratified by the Attorney General.

Petitioner's contention that the circular letter made an instruction from the Attorney General a prerequisite to prosecution also conflicts with the statutory duty of United States Attorneys to prosecute all offenses against the United States. Limitations on this authority will not be lightly implied. *United States* v. *Morgan*, 222 U.S. 274; *United States* v. *Dotterweich*, 320 U.S. 277.

Section 3740 of the Internal Revenue Code on which petitioner also relies is not relevant inasmuch as it relates only to civil proceedings.

II

The trial court did not abuse its discretion in denying petitioner's motion to withdraw his plea of *nolo contendere* after sentence had been imposed. Under Rule 32(d) of the Federal Rules of Criminal Procedure petitioner had the burden of establishing that such extraordinary relief was necessary to "correct manifest injustice." This he has failed

to do. Disappointment in the sentence imposed is insufficient to warrant withdrawal of the plea.

No claim of manifest injustice can be founded on the actions of the United States Attorney or his assistant. Nothing occurred at the various conferences at which the plea to be made by defendant was discussed to cause experienced counsel to be misled. No assurance or commitment was made by the United States Attorney that he would recommend probation and this was clearly understood by petitioner. No assurances were given that opposition would not be made to the granting of probation. In fact the United States Attorney made no statement with respect to probation.

After the pleas of *nolo contendere* were entered the trial court deferred sentencing so that a complete pre-sentence report could first be prepared by the probation officer. At the subsequent sentencing hearing the United States Attorney, two of petitioner's counsel, and the petitioner himself made statements. The United States Attorney first reviewed in detail the charges in those counts of the two indictments which were before the Court for sentencing. He introduced his further remarks by saying he felt he owed a duty to give the "background of the investigation" and petitioner's "history taxwise", making it clear that the civil claims to which he referred were not involved in the criminal proceedings. Petitioner's counsel had an opportunity to reply to the United States Attorney's explanation of the case and two of them did so reply. They emphasized both the fact that peti-

tioner's civil tax liabilities were not before the court and the previous civic record of petitioner. The petitioner himself made a statement requesting clemency. It was not until after the sentence had been announced by the court that petitioner considered the United States Attorney's remarks to have been so unfair as to require him to withdraw his plea.

The record fails to support petitioner's contention that the trial court abused its discretion in rejecting his later claims that he should be permitted to withdraw his plea to "correct manifest injustice."

ARGUMENT

I

The Indictments Were Returned by a Duly Constituted Grand Jury and Are Valid; They Were Not Subject to Dismissal Because Presentation of the Cases to the Grand Jury Had Not Previously Been Specifically Authorized by the Attorney General

The indictments herein were returned by a duly constituted grand jury of the District of Kansas. The petitioner does not attack the propriety of its organization, composition, proceedings or deliberations.

It is elementary that a Federal grand jury has the unquestioned right and duty to inquire into any matter within the jurisdiction potentially involving violations of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the United States Attorney, the Attorney General, or on its own initiative, from evidence it

may gather or from knowledge of its members. See *Hale* v. *Henkel*, 201 U.S. 43, 63-66; *United States* v. *Thompson*, 251 U.S. 408, 413-414; *Blair* v. *United States*, 250 U.S. 273, 282; *Frisbie* v. *United States*, 157 U.S. 160, 163; *United States* v. *Philadelphia & R. Ry. Co.*, 225 Fed. 301, 306, 307 (E.D. Pa.); *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal.); *In re Miller*, 17 Fed. Cas. No. 9552. See *Re Charge to Grand Jury*, 30 Fed. Cas. No. 18,248 (C.C.D. W. Va.), where the court stated (p. 980):

> You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. * * *
>
> In respect to the mode and extent of your inquiries, your own good sense will be your best guide.

The Constitution itself makes the grand jury a part of the federal judicial process. Amendment V, Constitution of the United States; see *Cobbledick* v. *United States*, 309 U.S. 323, 327.

Petitioner's contention that the indictments returned by this duly constituted grand jury are void is based solely on the fact that the United States Attorney in the District of Kansas presented certain facts and evidence to the grand jury without receiving specific prior direction from the Attorney General to do so. (Br. 13.) This, petitioner urges, was contrary to the requirements of Executive

Order No. 6166 (*supra*, pp. 3-4) and Circular Letter No. 2431, issued by the Attorney General to all United States Attorneys and dated August 10, 1933 (*infra*, pp. 40-41). The District Court held this claim to be without merit. The Court of Appeals affirmed.[2]

Unless the inherent power of the grand jury to investigate all criminal matters within the jurisdiction and to render indictments where it believes a violation of law has been committed has been restricted, the indictments herein were clearly lawful and sufficient.

Executive Order No. 6166 was issued pursuant to the Act of March 3, 1933, c. 212, Sec. 16, 47 Stat. 1517-1518 which provided for the reorganization of the executive departments in the interest of efficiency and economy in Government. The text of the executive order itself indicates that its sole purpose was to transfer certain functions then exercised by other Departments of the Government to the Department of Justice:

> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands

---

[2] Other district courts have similarly denied motions by defendants to dismiss indictments where United States Attorneys have presented evidence of violations of the revenue laws to the grand juries concerned without specific prior authorization from the Department of Justice. *United States* v. *Fred M. Saigh, Jr.*, No. 27136(3), E.D. Mo. (Eastern Division) (order dated Aug. 20, 1952) (unreported); *United States* v. *Evan Raymond Dale*, Criminal No. 18118, E.D. Ill. (Opinion dated May 1, 1954) (unreported).

> against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Nothing in the Order indicates that the power of the grand jury to indict was in any way intended to be limited. That power, as it existed before the Executive Order was issued, remained unimpaired after it was issued. The sole purpose of Section 5 of the Order was to centralize in the Attorney General responsibility for the conduct of proceedings to which the United States is a party.

Under the Executive Order the function of deciding whether to present evidence to a grand jury concerning violations of the revenue laws was transferred from the Solicitor of the Treasury to the Attorney General. Previously, instructions to prosecute in revenue cases had been submitted to United States Attorneys directly by the Treasury officials concerned. In order to discharge this function which had previously been exercised by the Solicitor of the Treasury, as a matter of internal departmental procedure, the Attorney General, by

Circular Letter 2431, directed all United States Attorneys to present evidence concerning violations of the revenue laws "only when authorized to do so by this office, unless an emergency calls for immediate action." (*Infra*, p. 41).

The Circular Letter is not in any sense an official rule or regulation which in any way concerns the general public, and does not, therefore, have the force and effect of law. The Circular Letter itself is addressed privately to "All United States Attorneys". (*Infra*, p. 40.) No reference to the Circular Letter will be found in the Code of Federal Regulations. It was not when issued, and is not now, a public document. The Circular Letter contains internal office instructions for the guidance of United States Attorneys. Patently, the Circular Letter was intended merely to control the internal functioning of the Department of Justice and was not intended to confer rights upon persons suspected of violating the revenue laws.

The instructions contained in the Circular Letter were issued in connection with the Attorney General's supervision of the work of United States Attorneys. See 28 U. S. C. 507(b). It may be noted that this record discloses constant supervision by the Attorney General over the United States Attorney in connection with the handling of these indictments. It is not denied that the United States Attorney, in this case, having evidence of a violation of law on which the statute of limitations was about to run, presented this evidence to the grand jury without specific prior authorization by the Department of Justice. The

Attorney General might have directed the United States Attorney to seek dismissal of these indictments when they came to his attention, but it is clear that he chose not to do so. The record indicates that when petitioner filed his motion to dismiss the indictments prior to trial on the ground that the indictments were defective because the Attorney General had not directed that the evidence be submitted to the grand jury, the Attorney General caused an affidavit to be filed stating that no statute requires that revenue cases be referred to the Department of Justice in Washington prior to the institution of criminal proceedings and informing the court that in some instances cases are referred directly to grand juries and United States Attorneys without prior review in the Tax Division of the Department of Justice (R. 24-25). The record shows further that before recommending acceptance of pleas of *nolo contendere* as to three counts and moving to dismiss the remaining counts in each indictment, the United States Attorney sought and obtained authority from the Department of Justice to do so, and so informed the court (R. 26).

Moreover, in the Circular Letter the Attorney General has authorized United States Attorneys to present evidence to the grand jury without specific authority from him whenever "an emergency calls for immediate action". (*Infra*, p. 41). The court of appeals found that petitioner made no showing that such an emergency did not exist here (R. 101). Nor did petitioner suggest that the United

States Attorney concerned did not himself believe that such an emergency existed. It may be noted in this connection that the first count of each indictment concerned the evasion of taxes by petitioner for the year 1945—an offense for which prosecution would have been barred by the statute of limitations on or about March 14, 1952. (26 U.S.C. 3748). The indictments herein concerned were returned on February 28, 1952 (R. 1, 3). In a practical sense, the Attorney General has ratified the actions taken in this case by his agent, the United States Attorney. It appears that he was satisfied with the conduct of his subordinate since he took no action to have the indictments set aside and, on the contrary, caused an affidavit to be filed supporting the previous action of the United States Attorney in going before the grand jury to present evidence in these cases. (R. 24-25.) Moreover, the United States Attorney is a part of the Department of Justice. In the absence of evidence to the contrary, he must be presumed to have acted within his authority. *United States* v. *One 1941 Cadillac Sedan*, 145 F. 2d 296, 299 (C.A. 7).

Petitioner's suggestion that the Circular Letter established a condition precedent to prosecution is untenable for yet another reason. United States Attorneys are under a statutory duty to "prosecute for all offenses against the United States." 28 U.S.C. 507(a)(1).

Patently Executive Order 6166 was not intended to deprive United States Attorneys of their right or relieve them of their duty to prosecute violations

of federal law. See *Hart Coal Corp.* v. *Sparks*, 9 F. Supp. 825, 831-32 (W.D. Ky.). Any limitations on their rights and duties will not be lightly implied. In *United States* v. *Morgan*, 222 U.S. 274, 281-82, this Court said, in disposing of a claim that an indictment was defective for the reason that the defendant had not been given a prior hearing in the Department of Agriculture which he claimed was due him under the statute:

> * * * If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., §§771, 1022. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers

> of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

The Court, moreover, more recently held that even where a statute required the Administrator, before reporting a violation for prosecution by the United States Attorney, to give the suspect an "opportunity to present his views", the statute did not establish a prerequisite to prosecution. *United States* v. *Dotterweich*, 320 U.S. 277.

Petitioner further argues that the action of the United States Attorney in presenting evidence to the duly constituted grand jury was unlawful as contrary to the requirements of Section 3740 of the Internal Revenue Code. Section 3740 provides as follows:

> No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. (53 Stat. 460.)

The plain language of this provision indicates that it relates only to civil proceedings. It was so construed by the court below, citing *United States ex rel. Marcus* v. *Hess*, 127 F. 2d 233 (C.A. 3), reversed on other grounds, 317 U. S. 537.

The term "suit" is generally applied to civil actions and is "seldom applied to a criminal prosecution". Black, *Law Dictionary*, 4th ed. 1951, p. 1603. When used in statutes, it has frequently been held that it "does not embrace a criminal prosecution." See, e.g., *United States* v. *Safeway Stores*, 140 F. 2d 834, 838 (C.A. 10). Moreover, the context of Sec. 3740 both internally and in relation to other provisions discloses that it is limited to civil actions. Sec. 3740 applies to suits "for recovery". The expression "suit for recovery" is primarily applicable to civil actions, and not to criminal prosecutions. *Stockwell* v. *United States*, 13 Wall. 531, 543; *Hepner* v. *United States*, 213 U. S. 103, 108-109. Civil remedies are recovered; criminal sanctions are imposed and prosecuted. This is none the less so because it provides for the recovery of taxes, fines, penalties or forfeitures. Forfeitures and penalties under the internal revenue laws are remedial sanctions to aid in the enforcement of the law and are recoverable in civil proceedings. See *Helvering* v. *Mitchell*, 303 U. S. 391, 400-401. Subchapter E, of which Section 3740 is a part, contains eight other sections. These other sections specifically refer to criminal proceedings or to criminal prosecutions where pertinent. (See 53 Stat. 460-62, 26 U. S. C. 1946 ed. Secs. 3741, 3748.)

Finally, this construction is confirmed by the Internal Revenue Code of 1954. Section 3740 of the 1939 Code appears in this new revision as Section 7401. In the revision "No suit" has been changed to read "No civil action". The committee reports

to both the House and Senate state that the section as revised contains "no material change from existing law". H. Rep. No. 1337, 83d Cong. 2d Sess., p. A430; S. Rep. 1622, 83d Cong., 2d Sess., p. 609.

The indictments which were returned by a duly constituted grand jury are valid. An authorization from the Attorney General to the United States Attorney to present evidence to a grand jury is not a prerequisite to prosecution. The order of the District Court, affirmed by the Court of Appeals, denying petitioner's motion in arrest of judgment for the reason that the court was without jurisdiction of the offense should be affirmed.

II

The District Court Did Not Abuse Its Discretion When It Denied Petitioner's Motion to Set Aside the Judgments of Conviction and to Permit Him to Withdraw His Pleas of *Nolo Contendere*

Petitioner contends that the trial court erred in refusing to allow him to withdraw his plea of *nolo contendere* under Rule 32(d) of the Federal Rules of Criminal Procedure. Rule 32(d) provides:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

It will be noted that under this Rule the withdrawal of a plea of *nolo contendere* after sentence is imposed may be made only "to correct manifest injustice."

The applicable principles of law are well established. A plea of *nolo contendere* is an admission of guilt for the purposes of the case, and a prison sentence may be imposed on such a plea. *Hudson* v. *United States*, 272 U. S. 451, 455. As the language of the rule makes clear, a person who has entered such a plea has no legal right to withdraw the plea. An application to withdraw the plea is addressed to the sound discretion of the trial court, and an order denying such an application is reviewable on appeal only for an abuse of such discretion. *Friedman* v. *United States*, 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U. S. 926; *United States* v. *Fox*, 130 F. 2d 56, 59-60 (C. A. 3), certiorari denied, 317 U. S. 666. The issue is whether the plea was entered by petitioner voluntarily and with understanding of its meaning or whether it was attributable to such justifiable ignorance of his rights or such fear, coercion or mistake as would justify the court in concluding that it ought not to be permitted to stand. To warrant withdrawal of a plea, some element of fraud or unfair imposition on defendant at the time the plea was entered must be shown. *Futterman* v. *United States*, 202 F. 2d 185 (C.A.D.C.); *Friedman* v. *United States*, *supra*; *United States* v. *Shneer*, 194 F. 2d 598, 599-600 (C.A. 3); *Williams* v. *United States*, 192 F. 2d 39, 40

(C. A. 5); *United States* v. *Colonna*, 142 F. 2d 210, 211-12 (C.A. 3); *Bergen* v. *United States*, 145 F. 2d 181, 186-87 (C. A. 8). In asking that his plea of *nolo contendere* be withdrawn after sentencing, petitioner had the burden of showing that such extraordinary relief was necessary "to correct manifest injustice." The District Court held that he failed to meet this burden and the Court of Appeals affirmed. The determinations of the two lower courts are entitled to great weight and should not be overturned in the absence of a clear showing of error.

Petitioner contends that he entered the plea of *nolo contendere* because he was led to believe that he would not be given a prison sentence if he entered such a plea. On what does he base this stated belief? He refers to discussions between his counsel and counsel for the Government which were had on April 6 and 7, 1953, after the jury was empaneled. The conference the evening of April 6 was at the invitation of the United States Attorney (R. 67). The three meetings the following day were at the initiative of petitioner's counsel (R. 64-65). During these conferences, the United States Attorney was not unfriendly. Various bases of settling the case were explored. The record shows that talks opened with a discussion of a plea of guilty (R. 62-63, 67). The United States Attorney stated that Mr. Luce, petitioner's counsel from Washington, first suggested that defendant might plead *nolo contendere* to one count in each indictment (R. 67). Mr. Luce, in his affidavit, states that *nolo contendere* was first suggested by the United States Attorney's assistant, Mr. Bingham (R. 63). All agree that the

various aspects of the plea were discussed, including the question whether such a plea would be authorized by the Department of Justice (R. 56, 59, 64, 69) or accepted by the court (R. 59, 63, 68). Finally the question of probation was discussed (R. 59, 60, 65, 68). The entire course of the conferences reveals an attempt by petitioner's experienced counsel to work out for their client as favorable a disposition of the case as possible (R. 69, 70). All of these conferences were duly reported to petitioner by his counsel "in detail" (R. 66) and his decision to plead *nolo contendere* was reached only, as petitioner himself states, "after considerable discussion and consideration" (R. 47). It is clear that his decision to change his plea was both considered and voluntary in every sense of the word.

It should be noted that there is no suggestion here that defendant was misled by any assumed assurance or agreement by the United States Attorney that if he would plead *nolo contendere* he would get probation. See *United States* v. *Shneer*, 194 F. 2d 598, 600 (C. A. 3). Apparently this had been one of the objectives of petitioner's counsel, for one of them, Mr. Harley, records in his affidavit that Messrs. Luce and Jochems reported to him in petitioner's presence late in the evening of April 7 that they had been "unable to obtain a commitment from Mr. Davis that he would make a recommendation for probation or suspended sentence" (R. 60). Petitioner personally was informed that the United States Attorney had said he would not be requested to make a recommendation to the court (R. 46).

The United States Attorney further informed petitioner's counsel that he would not recommend probation (R. 69). This is not disputed (R. 46). On the question whether the United States Attorney at any time stated that he would not oppose probation, as asserted by petitioner's counsel (R. 59, 63) but denied by the United States Attorney (R. 70) and his assistant (R. 71), the trial court found "that no promise of probation or leniency was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government" (R. 92). The core of petitioner's complaint comes down to the contention that the three counsel of his choice, all experienced lawyers, would not have advised him to plead *nolo contendere* if they had found the United States Attorney less friendly and cooperative in the course of these conferences on the eve of trial. This is a flimsy ground on which to base a motion to withdraw a plea after sentence has been pronounced.

Petitioner apparently attributes the court's action in sentencing him to imprisonment to an alleged "change in attitude" on the part of the United States Attorney between April 6 when the pleas were entered, and May 26 when the sentencing hearing was held. (Pet. Br. 24-25.) The court had deferred sentence to permit the preparation of a complete pre-sentence report by the probation office (R. 27). At the pre-sentencing hearing on May 26 the court invited the United States Attorney to make a statement about the case (R. 28, 91). The United States Attorney then reviewed

in detail the charges in those counts of the two indictments which were before the court for sentencing (R. 28, 29). He stated that the remaining counts in each of the indictments had been dismissed by the Government (R. 28). The United States Attorney then proceeded to give what he called the "background of the investigation" and petitioner's "history taxwise" (R. 29). In the course of this he informed the court of the extent of the civil liabilities claimed by the Government and noted some of the difficulties the Government had had in dealing with petitioner during the course of its investigation of his income tax returns. In closing he summarized the Government's claims as to petitioner's civil liabilities, noting that these amounts were not involved in the criminal case. (R. 29-34.)

The United States Attorney was followed by petitioner's counsel, Mr. Luce of Washington, D. C., who stressed, among other things, that the civil liabilities which had been mentioned were not before the court and that their amount was in dispute and would have to be settled by the Tax Court of the United States (R. 34). Mr. Luce noted that the United States Attorney's recommendation that the *nolo contendere* pleas as to three counts be accepted and that the remaining counts in each indictment be dismissed had been made with the approval of the Department of Justice (R. 35). Mr. Jochems, also of counsel for petitioner, suggested that petitioner's difficulties stemmed from his being too busy on bigger things and that there was no

actual fraud. He discussed the civic record of petitioner and asked that petitioner be placed on probation for whatever sentence the court imposed, mentioning in this connection that his health was not good. (R. 35-39.) Petitioner himself then made a brief statement beseeching clemency (R. 39).

The record of these proceedings at the sentencing hearing reflects the deep concern of petitioner's counsel for the very serious difficulties in which their client found himself. They surely hoped their client would not be sentenced to imprisonment, but it is equally clear that they appreciated that this was a matter within the discretion of the trial court to whom they were addressing their pleas for clemency.

Petitioner complains particularly with respect to the United States Attorney's mentioning the counts of the indictment which had been dismissed and his discussion of the civil liabilities of petitioner (Br. 24). But he fails to mention, as to the former, that the United States Attorney in his statement carefully segregated for the information of the court the charges in the counts of the indictments which were before the court for sentencing (R. 28, 29) and introduced his further discussion by saying that he felt he owed a duty to the court to review petitioner's tax difficulties (R. 29). With respect to petitioner's civil liabilities, he indicated clearly that the Government's claims as to petitioner's civil liability were not involved in the criminal case (R. 33-34), a fact which was stressed in turn by

each of petitioner's counsel in their statements to the court (R. 34-36). Nor was this likely in any sense to mislead the court. In a previous conference with the court in chambers to determine whether the court would accept a plea of *nolo contendere* the court had asked petitioner's counsel if there were any civil liabilities against petitioner. When informed that there were, the court remarked that even where a plea of guilty was entered this was always without prejudice to defendant's rights to dispose of his civil liabilities. (R. 64-65.)

Another factor which puts in some perspective petitioner's claims of unfairness on the part of the United States Attorney is the emphasis given the matter of the history in petitioner's family of Berger's disease. (Pet. Br. 24, 25, 34.) It appears that in the preliminary conferences with petitioner's counsel, the United States Attorney had mentioned that the Government investigation had revealed a history of Berger's disease in petitioner's family (R. 68). Petitioner states that the United States Attorney had informed his counsel that he "thought" the petitioner was subject to this disease (Pet. Br. 24). He now complains that the United States Attorney "did not mention the facts" as to Berger's disease in his address to the court (Pet. Br. 25). "The facts" as to this medical history were peculiarly within the knowledge of petitioner. His counsel, in his plea to the court for clemency, contented himself with the statement that "The man's health is not good, as is

shown by a medical report which was submitted to the Probation Officer." (R. 38.) The record in this Court does not show the facts as to Berger's disease and its relation, if any, to defendant. It does indicate, however, that a medical report was before the court at the time of sentencing (R. 27, 38).

No charges of prejudice, manifest injustice, or hostility on the part of United States Attorney were made by petitioner's counsel after hearing his explanation of the case to the Court. They had an opportunity to reply to the Government's statement and to make their own statement of the case and did so reply (R. 34-39). There was still time under Rule 32(d) to seek to withdraw the *nolo contendere* plea, as sentence had not yet been imposed. It would appear that petitioner's attorneys did not then consider that the United States Attorney's attitude was so different from what they anticipated as to lead them to advise petitioner to withdraw his plea. Instead, they concentrated in their statements to the court on those elements in the case which in their mature judgment indicated that probation would be a proper sentence.

Petitioner obviously was disappointed in his sentence. It is clear that the advice of counsel as to the sentence which will probably be imposed (*Ridgeway* v. *United States*, 205 F. 2d 680 (C.A. 6)), or defendant's expectations as to the sentence which will be imposed (see *United States* v. *Shneer*, 194 F. 2d 598, 600 (C.A. 3)), or the severity of the sentence which is actually imposed (*Stidham* v. *United States*, 170 F. 2d 294, 298 (C.A. 8) do not

provide grounds for the withdrawal of a plea. Petitioner has contended, therefore, that he was led to believe that the United States Attorney would not oppose probation, and complains of the United States Attorney's statements to the court at the sentencing hearing. The court of appeals, after holding that the trial court's finding that the United States Attorney had made no promise of leniency was supported by the evidence, further concluded as follows (R. 101):

> Even if it be assumed that the United States Attorney promised that he would not oppose an application for probation, there is nothing in this record to indicate that he did actively oppose probation. He was under a duty to present the relevant facts with respect to the offenses charged to the court. Those facts may have indicated that probation was not appropriate, but that cannot in any sense be construed to be a violation of his alleged promise not to oppose probation.

Determination of whether it would work "manifest injustice" to refuse to permit petitioner to withdraw his plea of *nolo contendere* after sentencing is a matter peculiarly within the competence of the trial court. Cf. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 216. The trial court saw and heard the United States Attorney and petitioner's counsel when the jury was sworn on April 6th, 1953 (R. 90), in the conference in chambers on April 7th (R. 64), in the court proceedings on

April 8th at which petitioner's pleas of *nolo contendere* were filed (R. 26-27), and in the later proceedings on May 26th, of which petitioner now complains, at the conclusion of which petitioner was sentenced. (R. 27-40.) If he believed there was merit to petitioner's claims, Rule 32(d) authorized him, in the exercise of his discretion and with the perspective available to him alone, to set aside the judgment and permit defendant to withdraw his plea. The evaluation of the trial court as to the merits of petitioner's claims is peculiarly entitled to weight where, as here, petitioner stresses the "attitude" of the United States Attorney in addressing the court as distinguished from the remarks he made. (Pet. Br. pp. 24, 36.)

This is not a case, such as those relied on by defendant, where the accused was not represented by counsel and was not familiar with the charges against him. *Von Moltke* v. *Gillies*, 332 U.S. 708; *Bergen* v. *United States*, 145 F. 2d 181, 187 (C.A. 8). This case is characterized rather by the vigor and competence of petitioner's counsel, including Mr. Luce of Washington, D. C., and Messrs. Jochems and Harley of Kansas, at every stage of the proceedings, and in particular by the thoroughness of their inquiries and the obviously soul-searching nature of their conferences with petitioner on April 6th and 7th with respect to the pleas to be entered (see R. 60).

Nor is this a case like *United States* v. *Lias*, 173 F. 2d 685 (C.A. 4), quoted at length by petitioner,

where the trial court, in the exercise of its discretion under Rule 32(d) permitted the defendant to withdraw a plea of guilty when it appeared that defendant was misled by statements made by the court to his counsel leading him to believe he would be placed on probation if he would so plead. Here the court was assured by petitioner's counsel prior to acting on the motion and found "that no statement of the court made to defendant's counsel or in the presence of defendant influenced the defendant's entrance of his pleas of *nolo contendere.*" (R. 92.) Nor is *Kercheval* v. *United States*, 274 U.S. 220, in point since there the court had allowed the defendant to withdraw his plea and the only question was the right of the prosecution to use the plea as evidence in the trial that followed.

We submit that petitioner has not shown that the trial court clearly erred in dismissing his motion to withdraw his plea.

It is not uncommon for cases, including criminal cases, to be settled on the eve of trial. There will frequently be conferences among counsel representing both sides of the controversy during which various formulæ for the disposition of the case will be explored and during which the factors which bear on the decisions which each side must make will be discussed. It is consistent with the effective administration of justice that such conferences should take place, it being borne in mind that the settlement of any criminal case is a matter within the control of the court. The courts will protect a

defendant who has been coerced or misled in some important respect in deciding to file a plea of guilty or *nolo contendere*. Under Rule 32(d) a motion to withdraw a plea of guilty or of *nolo contendere* may be made at any time before sentence is imposed. But the rule establishes a higher standard where a defendant seeks to withdraw his plea after sentence. In such a case, withdrawal of the plea—which has the effect of adding a second string to the defendant's bow—will be permitted only "to correct manifest injustice". This is for the very obvious reason that the defendant who pleads guilty or *nolo contendere* and receives a substantial sentence from the court will almost invariably feel, as petitioner says he does here, that he was misled in making his plea. The trial court, after reviewing the record and hearing argument, determined that no manifest injustice would result from its denial of petitioner's motion to withdraw his plea. The Court of Appeals affirmed. We submit that nothing in this record would justify overturning the considered judgment of the two lower courts.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

CHARLES F. BARBER,
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
HAROLD S. LARSEN,
Special Assistants to the Attorney General.

SEPTEMBER, 1954.

APPENDIX

The full text of Circular Letter No. 2431 appears below:

DEPARTMENT OF JUSTICE
Washington, D. C.

August 10, 1933.

CIRCULAR LETTER No. 2431

TO ALL UNITED STATES ATTORNEYS:

Re: Prosecutions Involving Violations of Revenue Laws.

The attention of all United States Attorneys is called to Section 5 of Executive Order of the President, No. 6166, dated June 10, 1933, promulgated under authority of Section 16 of the Act of March 3, 1933, Public No. 428, 47 Stat. 1517, which reads in part as follows:

SECTION 5—*Claims by or against the United States*

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

* * * * *

In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted.

Respectfully,

For the Attorney General,

WILLIAM STANLEY,
Assistant to the Attorney General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1934 316404 404